IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
Assigned on Briefs October 15, 2008

STATE OF TENNESSEE v. GEORGE C. PEERY, III

Appeal from the Criminal Court for Sullivan County
Nos. S51,943; S52,031 & S52,184 R. Jerry Beck, Judge

No. E2008-00086-CCA-R3-CD - Filed March 4, 2009

Appellant, George C. Peery, III, pled guilty to felony failure to appear, felony escape, possession of drug paraphernalia, and theft of property valued at less than $500. As part of the plea agreement, Appellant received an effective eight-year sentence at 35% for the convictions for failure to appear and escape. In addition, Appellant received concurrent sentences of eleven months and twenty-nine days at 75% for the drug paraphernalia and theft convictions, to run concurrently to each other but consecutively to the eight-year sentence. The trial court denied alternative sentencing on the basis that Appellant had "too many prior problems." On appeal we determine that the trial court properly denied alternative sentencing. Consequently, the judgments of the trial court are affirmed.

Tenn. R. App. P. 3 Appeal as of Right; Judgments of the Criminal Court are Affirmed.

JERRY L. SMITH, J., delivered the opinion of the court, in which JOHN EVERETT WILLIAMS and ROBERT W. WEDEMEYER, JJ., joined.

Raymond C. Conkin, Jr., Kingsport, Tennessee, for the Appellant, George C. Peery, III

Robert E. Cooper, Jr., Attorney General and Reporter; Clarence E. Lutz, Assistant Attorney General; Greeley Wells, District Attorney General, and William B. Harper, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

According to the record, the Sullivan County Grand Jury issued several presentments between May and July of 2006, charging Appellant with failure to appear, escape, facilitating escape, violation of motor vehicle registration, improper registration, possession of drug paraphernalia, driving on a suspended license, and theft. The charges arose after Appellant failed to return from a dental furlough. When he escaped, Appellant was in the midst of serving intensive probation on sentences that he received as punishment for forgery convictions in March of 2004.

Appellant later pled guilty to several of the charges. According to the judgments, Appellant pled guilty to possession of drug paraphernalia in exchange for a sentence of eleven months and twenty-nine days. Appellant also pled guilty to theft of $500 in exchange for a sentence of eleven months and twenty-nine days, failure to appear in exchange for a four-year sentence, and escape in exchange for a four-year sentence. The remaining counts were nolle prossed/dismissed as indicated by the box checked by the trial court on the judgment forms. The trial court ordered the two eleven-month, twenty-nine day sentences to run concurrently to each other, but consecutive to both of the four-year sentences. The trial court ordered the two four-years sentences to be served consecutively to each other and the two eleventh month, twenty-nine day sentences, for a total effective sentence of eight-years, eleven months, and twenty-nine days. The trial court conducted a sentencing hearing to determine whether Appellant was eligible for alternative sentencing.

At the sentencing hearing, Appellant admitted that he had thirteen prior felony convictions and was not eligible for regular probation. Appellant also admitted to the trial court that he had a February 9, 2004, violation for violating a prior community corrections sentence. Appellant attributed his criminal convictions to a "drug problem," explaining to the trial court that he was addicted to narcotic painkillers. Appellant informed the trial court that he was in intense outpatient therapy and had attended Narcotics Anonymous meetings in the past. Appellant asked the court for "help" and inpatient rehabilitation. Appellant introduced a letter from Haven Lighthouse, a rehabilitation center. Appellant admitted to the trial court that it was "time to do what's right."

At the conclusion of the hearing, the trial court denied alternative sentencing. The trial court determined that Appellant "just has too many prior problems, too many prior convictions, too many prior probations." Appellant "just keeps going on violating the law" so the trial court decided to require Appellant to serve his sentence. Appellant filed a timely notice of appeal.

Analysis

On appeal, Appellant argues that the trial court improperly denied probation or alternative sentencing because confinement was not necessary to protect society and Appellant "expressed regret" about his convictions and willingness to address his drug addiction. Furthermore, Appellant opined that a sentence of probation or community corrections would in no way depreciate the seriousness of the offense and that no evidence was presented to show that a sentence of confinement would have a deterrent effect on others likely to commit similar offenses. Finally, Appellant concedes that he has thirteen prior convictions but contends that measures less restrictive than confinement would best suit his situation. The State disagrees, claiming that the trial court properly denied alternative sentencing.

"When reviewing sentencing issues . . . the appellate court shall conduct a de novo review on the record of the issues. The review shall be conducted with a presumption that the determinations made by the court from which the appeal is taken are correct." T.C.A. § 40-35-401(d). "However, the presumption of correctness which accompanies the trial court's action is conditioned upon the affirmative showing in the record that the trial court considered the

sentencing principles and all relevant facts and circumstances." *State v. Ashby*, 823 S.W.2d 166, 169 (Tenn. 1991). In conducting our review, we must consider the defendant's potential for rehabilitation, the trial and sentencing hearing evidence, the pre-sentence report, the sentencing principles, sentencing alternative arguments, the nature and character of the offense, the enhancing and mitigating factors, and the defendant's statements. T.C.A. §§ 40-35-103(5), -210(b); *Ashby*, 823 S.W.2d at 169. We are to also recognize that the defendant bears "the burden of showing that the sentence is improper." *Ashby*, 823 S.W.2d at 169.

Alternative Sentencing

With regard to alternative sentencing, Tennessee Code Annotated section 40-35-102(5) provides as follows:

> In recognition that state prison capacities and the funds to build and maintain them are limited, convicted felons committing the most severe offenses, possessing criminal histories evincing a clear disregard for the laws and morals of society, and evincing failure of past efforts at rehabilitation shall be given first priority regarding sentencing involving incarceration . . . .

A defendant who does not fall within this class of offenders "and who is an especially mitigated offender or standard offender convicted of a Class C, D, or E felony should be considered as a favorable candidate for alternative sentencing options in the absence of evidence to the contrary. A court shall consider, but is not bound by, this advisory sentencing guideline." T.C.A. § 40-35-102(6) (2006);[1] *see also State v. Carter*, 254 S.W.3d 335, 347 (Tenn. 2008). With certain exceptions, a defendant who committed offenses prior to June 7, 2005, is eligible for probation if the sentence actually imposed is eight years or less. T.C.A. § 40-35-303(a) (2003). For offenses committed on or after June 7, 2005, a defendant is eligible for probation if the sentence actually imposed is ten years or less. *See* T.C.A. § 40-35-303(a) (Supp. 2005).

All offenders who meet the criteria for alternative sentencing are not entitled to relief; instead, sentencing issues must be determined by the facts and circumstances of each case. *See State v. Taylor*, 744 S.W.2d 919, 922 (Tenn. Crim. App. 1987) (citing *State v. Moss*, 727 S.W.2d 229, 235 (Tenn. 1986)). Even if a defendant is a favorable candidate for alternative sentencing under Tennessee Code Annotated section 40-35-102(6), a trial court may deny an alternative sentence because:

> (A) Confinement is necessary to protect society by restraining a defendant who has a long history of criminal conduct;

[1] The 2005 amendment removed language that provided that the described offenders were presumptively eligible for alternative sentencing in the absence of evidence to the contrary and made the guidelines "advisory" in nature.

(B) Confinement is necessary to avoid depreciating the seriousness of the offense or confinement is particularly suited to provide an effective deterrence to others likely to commit similar offenses; or

(C) Measures less restrictive than confinement have frequently or recently been applied unsuccessfully to the defendant . . . .

T.C.A. § 40-35-103(1)(A)-(C). In choosing among possible sentencing alternatives, the trial court should also consider Tennessee Code Annotated section 40-35-103(5), which states, in pertinent part, "[t]he potential or lack of potential for the rehabilitation or treatment of a defendant should be considered in determining the sentence alternative or length of a term to be imposed." T.C.A. § 40-35-103(5); *State v. Dowdy*, 894 S.W.2d 301, 305 (Tenn. Crim. App. 1994). The trial court may consider a defendant's untruthfulness and lack of candor as they relate to the potential for rehabilitation. *See State v. Nunley*, 22 S.W.3d 282, 289 (Tenn. Crim. App. 1999); *see also State v. Bunch*, 646 S.W.2d 158, 160-61 (Tenn. 1983); *State v. Zeolia*, 928 S.W.2d 457, 463 (Tenn. Crim. App. 1996); *State v. Williamson*, 919 S.W.2d 69, 84 (Tenn. Crim. App. 1995); *Dowdy*, 894 S.W.2d at 305-06.

Appellant herein pled guilty to felony failure to appear, felony escape, possession of drug paraphernalia, and theft of property valued at less than $500. He was sentenced to less than ten years in incarceration for the crimes. Therefore, he is eligible for alternative sentencing. However, Appellant is not considered to be a favorable candidate for an alternative sentence, as he is not an especially mitigated or standard offender. *See* T.C.A. §§ 40-35-102(6) & -303(a). We have reviewed the record on appeal and find that the trial court considered the sentencing principles and all pertinent facts in the case. Therefore, there is a presumption of correctness in the findings of the trial court.

With regard to Appellant's prior record, the presentence report shows thirteen prior convictions. Appellant admitted that he had a rather extensive criminal history but blamed his criminal convictions on his addiction to narcotics. The trial court specifically noted the extent of Appellant's "prior problems" and pointed out that the current convictions stemmed from events that occurred when Appellant did not return from a dental furlough. We determine that there is ample evidence in the record to support the trial court's denial of alternative sentencing. It is clear from the record that measures less restrictive than confinement have been unsuccessfully applied to Appellant in the past. The record supports the trial court's denial of probation.

Community Corrections

Appellant does not specifically argue that he is entitled to a sentence under community corrections under the special needs provision. He asserts that his drug addiction was the reason for his criminal behavior and that the trial court erred by not granting him an alternative sentence or admission to a treatment facility based upon that reason. Because Appellant was convicted of a non-violent felony offense, however, he is eligible for, but not automatically entitled to, a community

corrections sentence under the primary section of the Community Corrections Act. T.C.A. § 40-36-106(a); *State v. Taylor*, 744 S.W.2d 919, 922 (Tenn. Crim. App. 1991). The Community Corrections Act was meant to provide an alternative means of punishment for "selected, nonviolent felony offenders . . . , thereby reserving secure confinement facilities for violent felony offenders." T.C.A. § 40-36-103(1); *see also State v. Samuels*, 44 S.W.3d 489, 492 (Tenn. 2001). Pursuant to statute, offenders who satisfy the following minimum criteria are eligible for participation in a community corrections program:

> (A) Persons who, without this option, would be incarcerated in a correctional institution;
>
> (B) Persons who are convicted of property-related, or drug- or alcohol-related felony offenses or other felony offenses not involving crimes against the person as provided in title 39, chapter 13, parties 1-5;
>
> (C) Persons who are convicted of nonviolent felony offenses;
>
> (D) Persons who are convicted of felony offenses in which the use or possession of a weapon was not involved;
>
> (E) Persons who do not demonstrate a present or past pattern of behavior indicating violence;
>
> (F) Persons who do not demonstrate a pattern of committing violent offenses; and
>
> (2) Persons who are sentenced to incarceration or are on escape at the time of consideration will not be eligible for punishment in the community.

T.C.A. § 40-36-106(a). Section (c) of this same statute, which is sometimes referred to as the "special needs" provision, states:

> Felony offenders not otherwise eligible under subsection (a), and who would be usually considered unfit for probation due to histories of chronic alcohol, drug abuse, or mental health problems, but whose special needs are treatable and could be served best in the community rather than a correctional institution, may be considered eligible for punishment in the community under the provisions of this chapter.

In other words, felons not otherwise eligible under the criteria of subsection (a) are eligible under subsection (c) of Tennessee Code Annotated section 40-36-106 if they are unfit for probation due to a history of chronic alcohol or drug abuse or mental health problems, but their special needs are better treatable in a community corrections program than in incarceration. An offender must also

be eligible, but generally unfit for probation in order to qualify for a community corrections sentence under subsection (c). *State v. Staten*, 787 S.W.2d 934, 936 (Tenn. Crim. App. 1989); *State v. Brent Heath Clark*, No. M2007-00461-CCA-R3-CD, 2008 WL 2743646, at *5 (Tenn. Crim. App., at Nashville, Jun. 16, 2008).

Even though Appellant was statutorily eligible for a community corrections sentence under sections 40-36-106(a) and, arguably, (c), his criminal history and conduct indicate a lack of potential for rehabilitation. He admits that he has on parole at least one time prior to the current convictions and had been in drug treatment facility. Further, Appellant admitted that several of the current offenses were the result of Appellant failing to return from a dental furlough. The record indicates that previous attempts at rehabilitation have proven unsuccessful. Moreover, Appellant has failed to prove that his special needs could be better met in a community corrections setting as opposed to an incarcerative one. Under these circumstances the trial court's determination that Appellant is not entitled to an alternative sentence or a community corrections sentence is amply supported by the record. Consequently, we affirm the judgment of the trial court ordering Appellant to serve his sentence in incarceration.

Conclusion

For the foregoing reasons, the judgment of the trial court is affirmed.

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JERRY L. SMITH, JUDGE